STATE OF CALIFORNIA

OFFICE OF ADMINISTRATIVE LAW

2001 OAL Determination No. 3

March 28, 2001

Requested by: **PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY**

Concerning: **DEPARTMENT OF TOXIC SUBSTANCES CONTROL-- interpretation of the term "recycling" found in Health & Safety Code section 25143.2(c)(2)**

Determination issued pursuant to Government Code Section 11340.5; California Code of Regulations, Title 1, Section 121 et seq.

ISSUE

In determining that the recycling and disposing of silver-bearing waste water by Safety Kleen Systems, Inc. qualified as an exemption from hazardous waste permit requirements, did the Department of Toxic Substances Control interpret the term "recycling" in a manner that would constitute a "regulation" as defined in Government Code section 11342.600, which is required to be adopted pursuant to the Administrative Procedure Act (Gov. Code, div. 3, tit. 2, ch. 3.5, sec. 11340 et seq.; hereafter, the APA)?
[1]

1. This request for determination was filed by Jeffrey Ruch, Executive Director, Public Employees for Environmental Responsibility, 2001 S Street, NW, Suite 570, Washington, DC 20009, (202) 265-7337. The Department of Toxic Substances Control's response was filed by Dennis H. Mahoney, Senior Staff Counsel, Department of Toxic Substances Control, 400 P Street, 4th Floor, P.O. Box 806, Sacramento, CA 95812-0806, (916) 324-0339. This request was given

CONCLUSION

In determining that the recycling and disposing of silver-bearing waste water by Safety Kleen Systems, Inc. qualified as an exemption from hazardous waste permit requirements, the Department of Toxic Substances Control did not interpret the term "recycling" in a manner that would constitute a "regulation" as defined in the APA because the Department's interpretation was directed to a specific person or entity based on peculiar facts and circumstances that did not apply generally throughout the state.

ANALYSIS

The Department of Toxic Substances Control ("Department") is the California state agency responsible for insuring that hazardous wastes are disposed of pursuant to the requirements of the Hazardous Waste Control Law. (See Health and Safety Code sections 25100 - 25250.27.) Those who treat or recycle hazardous wastes are usually required to obtain a permit from the Department. There are, however, exceptions to this rule, which are found in Health and Safety Code section 25143.2.

In September 1998, Safety Kleen Systems, Inc., ("Safety Kleen") asked the Department if its disposition of photochemical waste qualified for a recycling exemption under Health and Safety Code section 25143.2. The treatment process reduced the waste to a distiller sludge and distilled water with ammonia and less than 0.05 ppm silver,[2] which Safety Kleen proposed to use to water potted plants at the onsite college nursery. The water would not drain to the ground, and the potted plants receiving the recycled water would not be food plants.[3]

Based primarily on these facts, the Department determined that "the subsequent use of the distilled water to water potted, non-food plants at the same facility . . . would qualify for an exemption [as recyclable material] pursuant to [Health and Safety Code] section 25143.2(c)(2)."[4]

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a file number of 99-023. This determination may be cited as "**2001 OAL Determination No. 3.**"

2. Letter of Department to Safety Kleen Systems, dated September 30, 1998, p. 1.
3. Letter of Department to Safety Kleen Systems, dated September 30, 1998, p. 1.
4. *Id*. at p. 3.

Public Employees for Environmental Responsibility ("PEER") challenged this action, claiming the Department had utilized an underground regulation with respect to its interpretation of the term "*recycling*." In this respect, PEER questioned whether Safety Kleen's activities may be legally labeled "recycling," pursuant to California Health and Safety Code, section 25143.2(c)(2), based on the amount of waste water used to water the potted plants.[5]

In a determination, OAL is authorized only to answer the question of whether an agency's rule or policy is a "regulation" which should have been, but was not, adopted pursuant to the APA.[6] The issue of whether the Department was correct in concluding that the process used by Safety Kleen qualified for the recycling exemption pursuant to Health and Safety Code section 25143.2 is not an appropriate issue to be addressed by OAL in a determination.[7]

A determination of whether the Department utilized or enforced a "regulation" subject to the APA depends on (1) whether the APA is generally applicable to the quasi-legislative enactments of the Department, (2) whether the challenged interpretation is a "regulation" within the meaning of Government Code section 11342.600, and (3) whether the challenged interpretation falls within any recognized exemption from APA requirements.

(1) As a general matter, all state agencies in the executive branch of government not expressly or specifically exempted by statute are required to comply with the rulemaking provisions of the APA when engaged in quasi-legislative activities. (*Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744, 746-747; Government Code sections 11340.9, 11342.520 and 11346.) In this connection, the term "state agency" includes, for

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5. PEER request for determination, dated November 16, 1999, pp. 2 – 3.

6. Government Code section 11340.5, subdivision (b).

7. PEER and the commenter's statements seem to focus on the amount of the waste water recycled by Safety Kleen. They argue that if all of the recyclable material is not recycled then the exemption does not apply. OAL notes that section 25143.2(c) contains the following language: ". . . *any* recyclable material may be recycled at a facility that is not authorized by the department . . . if either of the following requirements is met. . . ." (Emphasis added.) The plain meaning of the word "any" includes "some, no matter how much or how little, how many, or what kind." (Webster's New World Dict., 2d college ed. 1982, p. 62.) Without determining the legality of the Department's actions outside the requirements of the APA, we think that the Department did not embellish upon the meaning of Health and Safety Code section 25143.2(c) by determining that Safety Kleen qualified for the exemption even though all of the recyclable material was not recycled.

purposes applicable to the APA, "every state office, officer, department, division, bureau, board, and commission." (Government Code section 11000.) The Department is in neither the judicial nor legislative branch of state government; it is in the executive branch of state government.

Furthermore, Health and Safety Code section 25106, found in the Department's enabling legislation, provides as follows:

> "*Except as expressly provided by statute*, this chapter does not supersede or modify Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code [the APA]." [Emphasis added.]

Thus, unless expressly or specifically exempted by statute, the APA rulemaking requirements generally apply to the Department. (See *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 942, 107 Cal.Rptr. 596, 603 (agency created by Legislature is subject to and must comply with APA).)

(2) Government Code section 11340.5, subdivision (a), prohibits state agencies from issuing rules without complying with the APA. It states as follows:

> "(a) *No* state agency shall issue, utilize, enforce, or attempt to enforce *any* guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a [']regulation['] as defined in Section 11342.600, *unless* the guideline, criterion, bulletin, manual, instruction, order, standard of general application or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]. [Emphasis added.]"

Government Code section 11342.600, defines "regulation" as follows:

> ". . . *every* rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by *any* state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure . . . . [Emphasis added.]"

According to *Engelmann v. State Board of Education* (1991) 2 Cal.App.4th 47, 62, 3 Cal.Rptr.2d 264, 274 -275, agencies need not adopt as regulations those rules contained in a "'statutory scheme which the Legislature has [already] established .

. . .'" But "to the extent [that] any of the [agency rules] depart from, or embellish upon, express statutory authorization and language, the [agency] will need to promulgate regulations. . . ." (*Ibid.*)

Similarly, agency rules properly adopted *as regulations* (i.e., California Code of Regulations ("CCR") provisions) cannot be legally "embellished upon." For example, *Union of American Physicians and Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 500, 272 Cal.Rptr. 886, 891 held that a terse 24-word definition of "intermediate physician service" in a Medi-Cal regulation could not legally be supplemented by a lengthy seven-paragraph passage in an administrative bulletin that went "far beyond" the text of the duly adopted regulation. Thus, statutes may legally be amended only through the legislative process; duly adopted regulations—generally speaking—may legally be amended only through the APA rulemaking process.

Under Government Code section 11342.600, a rule is a "regulation" for these purposes if (1) the challenged rule is *either* a rule or standard of general application *or* a modification or supplement to such a rule and (2) the challenged rule has been adopted by the agency to *either* implement, interpret, or make specific the law enforced or administered by the agency, *or* govern the agency's procedure. (See *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251; *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, 890.)

For an agency policy to be a "standard of general application," it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind, or order. (*Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 630, 167 Cal.Rptr. 552, 556. See *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 323-324 (standard of general application applies to all members of any open class).)

The Department observes that the interpretation of "recycling" at issue here was "*expressly directed to a specifically-named person*."[8] (Emphasis added.) The Department also notes as follows:

> "Moreover, [the letter to Safety Kleen] is *based on specific facts and circumstances*, such as the lack of water drainage to the ground and the assurance that the plants are not intended for food consumption. There was

8. Department's response to the request for determination, p. 4.

> never any intent demonstrated that the advice would be for general application throughout the state."[9] [Emphasis added.]

The fundamental difference between a case-specific adjudication and policies of general application was distinguished by the California Supreme Court in *Pacific Legal Foundation v. California Coastal Commission* (1982) 33 Cal.3d 158, 188 Cal.Rptr. 104. The court stated the following:

> "The action under consideration – adoption of guidelines interpreting the Coastal Act's access provisions – *unquestionably falls within the category of quasi-legislative agency action, as opposed to quasi-judicial or adjudicatory proceedings.* [Citations.] The guidelines are the formulation of a general policy intended to govern future permit decisions, rather than the application of rules to the peculiar facts of an individual case." (33 Cal.3d at 168 – 169, 188 Cal.Rptr. at 110 – 111 [Emphasis added].)

In the matter before us, the Department analyzed the specific facts involving Safety Kleen in light of the controlling legal provisions found in Health and Safety Code section 25143.2. It is well-settled that the specific interpretation and application of the law to one particular party under peculiar facts and circumstances is not a rule or standard of general application. (See *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 323 – 324, 253 P.2d 659; Government Code section 11340.9, subdivision (i).) Thus, the Department's interpretation of "recycling," as it applied solely to Safety Kleen and to the circumstances as presented by Safety Kleen, is not a rule or standard of general application, and therefore, is not a "regulation" subject to the APA.

Because the Department's interpretation of "recycling" was directed to a specific person or entity based on peculiar facts and circumstances that did not apply generally throughout the state, we conclude that the Department was not issuing or utilizing a "regulation" subject to the APA in determining, pursuant to Health and Safety Code section 25143.2, that Safety Kleen was recycling silver-bearing waste water in a manner that qualified it for the exemption from hazardous waste permit requirements.

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9. *Id*. at pp. 4 – 5.

DATE: March 28, 2001

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